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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 255

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Local 50, American Bakery and Confectionery Workers Union, AFL-CIO prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 339 F. 2d 324 and is reprinted in Appendix A, pp. 1a-11a, *infra*. The Decision and Order of the National Labor Relations Board is reported at 143 NLRB 233 and is reprinted in Appendix B, pp. 12a-26a, *infra*.

JURISDICTION

The case was decided by the Court of Appeals on November 24, 1964. Timely petitions for rehearing and for rehearing en banc were denied on January 15, 1965 and the decree enforcing the order of the Board entered on January 18, 1965. On April 7, 1965 Mr. Justice Harlan entered an order extending the time for filing a petition for a writ of certiorari to June 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does an interpretation of a collective agreement which affects employment rights violate § 8(a)(3) of the Taft-Hartley Act merely because the factual predicate of the interpretation appears in the by-laws of the union?

2. Does an interpretation of a collective agreement which affects employment rights violate § 8(a)(3) of the Taft-Hartley Act because the factual predicate of the interpretation is not expressly spelled out in the agreement, even though the same interpretation would be lawful if its factual basis were spelled out in the agreement?

STATUTE INVOLVED

This case involves §§ 7, 8(a)(1), 8(a)(3), 8(b)(1)(A), 8(b)(2), 8(d) and 203 (d) of the Labor Management Relations Act of 1947 as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 161 *et seq.*). These provisions are printed as Appendix C to this Petition, pp. 27a-30a.

STATEMENT OF THE CASE

A. The Background Facts[1]

Petitioner Local 50, American Bakery & Confectionery Workers Union, AFL-CIO (hereafter the Union) is the collective bargaining representative of the employees of Ward Baking Company at Ward's Bronx plant. The Union began a strike at the Bronx plant on September 1, 1962, over the terms of a new collective bargaining agreement. During the course of the strike an employee, Charles Fisher, the charging party in the Labor Board proceeding, who was a member of Local 50, obtained employment in Ward's Newark plant whose employees are represented by Local 84 of the American Bakery & Confectionery Workers Union, AFL-CIO, a sister Local of petitioner. On October 29, Fisher came to the offices of Local 50 and requested the Union to issue to him a withdrawal card pursuant to the by-laws of Local 50 and the American Bakery & Confectionery Workers International Union (hereafter the International). These provisions, which are identical (JA pp. 173-4; 175-6), entitle a member of one Local, upon request, to seek employment in the jurisdiction of another local and to join the other local without paying a new initia-

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[1] Except for the text of documents which are printed in the record, this Statement is taken from the findings of the Trial Examiner (JA pp. 181-187) which were affirmed by the Board (JA p. 178). Appropriate record references are given for all quotations from documents. Throughout this Petition "JA" refers to the Joint Appendix in the Court of Appeals, which is Volume I of the Record filed with the Clerk, and "Supp. App." refers to the Supplemental Appendix which was printed as an Appendix to the Union's Brief below and which is in Volume II of the Record filed with the Clerk. Nine copies of the Joint Appendix and nine copies of the Union's Brief below have been lodged with the Clerk.

tion fee. The relevant provisions of Article XIV of the Local 50 by-laws are as follows: (JA pp. 173-4)

> § 1 "A withdrawal card shall signify that the member has voluntarily withdrawn from his Local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his Local union."
>
> § 2. "A Local *shall issue* a withdrawal card *upon application* by a member, if the member is paid up in his dues, assessments and fines including the month of issuance and pays a fee of $2.00." (Emphasis supplied)
>
> § 4 provides:
>
> "Upon depositing his valid withdrawal card with any Local union a member shall be readmitted to active membership *without the payment of a new initiation fee* upon the same terms and conditions as apply to other active members." (Emphasis supplied).

On November 7, the strike ended with the signing of a settlement agreement, renewing (with modifications not here relevant) the prior agreement between the union and the company. The agreement provided that "all present employees shall, as a condition of continued employment maintain their membership in the union during the life of this agreement through regular payment of dues to the union." (Supp. App. p. 6a) The contract also gave the employees seniority rights but provided that these terminate when the employee "voluntarily quits" or loses his job for other reasons specified in the agreement (JA pp. 171-172). Because of a substantial reduction in the work to be performed at the Bronx plant only about 60 of the approximately 450 employees were to be recalled im-

mediately and on November 8 company and Union representatives met to determine which employees should be recalled. The parties used a Company-wide roster, and going down name by name followed seniority in determining who was to be recalled. Because it is critical to this case we quote directly the findings relating to the circumstances by which it was determined that Fisher would not be recalled:

> "When Fisher's name (35th on the list) was reached, the Union took the position that he had obtained a 'transfer' or withdrawal card and was not entitled to recall. Accordingly, his name was scratched on the list and he was passed over." (JA p. 182)

The Trial Examiner also found that:

> "the Union's representatives told Personnel Manager McGuire that Fisher was not to be recalled because he had taken out a withdrawal card from the Union and thus had quit his employment." (JA p. 185)

During the following week Fisher was laid off at the Newark plant due to the reduction in force and then inquired regarding a job at the Bronx plant. Within the next few days two Union representatives reiterated to McGuire that Fisher was not entitled to reinstatement.

B. Proceedings Below

Fisher thereupon filed a charge with the Labor Board alleging that the Union had violated §8(b)(1)(A) and 8(b)(2) by opposing his reinstatement. The General Counsel issued a complaint on that charge alleging alternatively that the Union had caused the Company to discriminate against Fisher because Fisher

"had obtained a withdrawal of membership card from Respondent" and/or "worked for Ward during the strike." After the usual hearing Trial Examiner Ivar H. Peterson rejected the latter allegation (JA p. 187, n. 4) but nonetheless found the union guilty of violating §8(b)(1)(A) and 8(b)(2). His reasoning was as follows: (JA pp. 187-88)

> "The refusal of the Company to reinstate Fisher was the direct result of the position taken by the Respondent's representatives in the November 8 conference with Personnel Manager McGuire and in subsequent conversations with him. In thus insisting that the procurement of a withdrawal card from the Union was the equivalent of a voluntary quit, a result not sanctioned by the contract but indeed contrary to its provisions governing loss of seniority, the Respondent caused the Company to discriminate against Fisher. The Respondent's real purpose, I find, was to enforce as a condition of employment its bylaws provision that by obtaining a withdrawal card a member withdrew 'from holding or seeking employment' within the work or geographic jurisdiction of the Respondent,[5] and thereby to encourage employees to remain active members of the Union. Accordingly, I find that the Respondent caused the Company to discriminate against Fisher in violation of Section 8(a)(3) of the Act and that thereby the Respondent violated Section 8(b)(2) and (1)(A) of the Act."[6]

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[5] Stated otherwise, what the Union's position comes down to is that only active members, excluding those who have taken out a withdrawal card, are entitled, under this provision in its bylaws, to hold or seek employment within the Union's work or geographic jurisdiction. This, it seems to me, is tantamount to attempting to maintain closed-shop conditions.

[6] See *Brunswick-Balke-Collender Company*, 135 NLRB 574; *International Union of Operating Engineers, Local No. 12, AFL-CIO (Engineers Limited and Pacific Pipeline Construction)*, 135 NLRB 1252.

The Examiner recommended that the Union be ordered to notify Ward that it has no objection to Fisher's reinstatement and to make Fisher whole for any loss of pay as a result of the period in which he was declined reinstatement.

The union excepted to the Trial Examiner's Intermediate Report, but the Board in its Decision and Order (JA pp. 177-179) affirmed his findings, conclusions and recommendations, adding the following explanation set out as a footnote to its decision:

> "As set forth in the Intermediate Report, the Respondent's bylaws and the constitution of its International each contain a provision which states: 'A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union.' In view of the specific findings of the Trial Examiner, which we are adopting, that the provision in question was not in the contract between the Respondent and the Company, and therefore, cannot avail the Respondent as a defense, we do not reach or pass upon the issue of the legality of such a provision if it were a part of the contract." (JA p. 178, n. 2)

The Court of Appeals enforced the Board's order, Judge Friendly dissenting. (Appendix A, pp. 1a-11a, *infra.*)

REASONS FOR GRANTING THE WRIT

Introduction

The Board found the denial of reinstatement to Fisher to be illegal because the union relied on a by-law based provision in urging that Fisher not be reinstated and because that provision was not incorporated in the agreement. Each of these elements raises issues worthy of the attention of this Court: In holding that the Union violated the Act because a Union by-law was involved, the Board misreads *Radio Officers* v. *Labor Board,* 347 U.S. 17, in a manner which penalizes unions for having perfectly lawful union rules, and specifically jeopardizes the continuing validity of withdrawal-card rules which are an almost universal phenomenon in the labor movement and which enhance rather than restrict the rights of members; the further holding that the legality of resolution of a question arising under an agreement depends on whether its basis is explicitly spelled out therein is utterly without statutory foundation and seriously embarrasses the collective bargaining process and especially the administration of contracts.

I. The Court Below Has Sanctioned a Misreading of Radio Officers Which Jeopardizes Traditional and Widespread Union Practices

In *Radio Officers* v. *Labor Board,* 347 U.S. 17, 40, this Court held that subject to limitations, the phrase "membership in a labor organization" in § 8(a)(3) includes "participation in Union activities as well as * * * adhesion to union membership.":

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8 (a)(3) and 8(b)(2) were designed to allow em-

> ployees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Id.*

Thus, the Court held that a union could not punish a member for violating the union's rules by causing the employer to disadvantage him in the employment relationship.[2] The question presented by this case, however, is whether the Board properly extended *Radio Officers* to find a violation where the union did not cause an employee's *punishment* for *violating* the rule, but rather resorted to the rule only to interpret an action of the employee and to determine his status under the collective bargaining agreement in light of that action.

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[2] The Court was not called upon in *Radio Officers* to consider the scope of the "limitations" (347 U.S. at 39) to which this principle was subject in interpreting "union membership" where encouragement is alleged. In our view the statute contemplates a distinction between those union rules which relate to the members' associational rights and those which deal with the employment situation. The "discouragement" cases cited by the Court, 347 U.S. at 39, n. 38, support this distinction. The issue is an important one, because unions have historically prescribed minimum employment standards or goals in their bylaws. A holding that a union violates the Act when it obtains the employer's acquiescence to such rules would seriously interfere with the rights of unions without promoting the Congressional objective to outlaw the closed shop. It may be that this issue is imbedded in the instant case and would have been presented if the Board's finding that the union was enforcing its by-laws were correct and if the Board had articulated its reasons for believing that the by-law promotes "membership" within the meaning of § 8(a)(3). See pp. 14-16, *infra*. We wish to preserve our right to argue the issue if certiorari is granted since the Court might conclude that it is necessary to the disposition of the case.

The Union and the Company were determining what employees should be returned to work and proceeded under the seniority provisions of the collective bargaining agreement. One of these provisions was that an employee loses his seniority rights if he "voluntarily quits" (JA p. 185). We repeat the critical finding of what occurred:

> "The union's representatives told Personnel Manager McGuire that Fisher was not to be recalled because he had taken out a withdrawal card from the Union and thus had quit his employment." (JA pp. 184-185)

This finding makes clear that the Union was not punishing Fisher for having taken a withdrawal card, but that it was simply interpreting his act of taking a withdrawal card in the light of the by-law to conclude that he had "voluntarily quit". The Union's understanding was based on the fact that the by-laws relating to withdrawal cards expressly provide:

> "A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union." (JA p. 173)

Thus, the taking of a withdrawal card symbolized Fisher's voluntarily quitting just as a letter from him to the Union stating "I, Charles Fisher, voluntarily quit my employment at Ward's Bronx Plant." It is also the same as if there were a general custom, not embodied in a rule, that members who take withdrawal cards are "withdrawing", i.e. are leaving the local's jurisdiction to seek work elsewhere. If there had been such a practice the Union officials' understanding would have been the same as here, and in discussing

with the employer whether any of the employees on the seniority list had "voluntarily quit" they would have taken the same action that they took in this case.[3] Yet the Board would not find a violation in either of these hypothetical situations because under its theory the existence of a published Union rule is an element of the offense. To allow liability to be predicated on the mere existence of a Union rule is to seriously misread and expand *Radio Officers;* the principle of that decision is that an employee may not be punished (either by the employer independently or at the behest of a Union) because he has failed to obey a Union rule. In terms of *Radio Officers,* one cannot be a "good member" or a "bad member" in relation to the petitioner's withdrawal card by-laws.[4] One can only choose to exercise the privilege granted by them by accepting the status which that implies or one can decline to exercise that choice. To find a violation under these circumstances is not "to insulate employees' job rights from their membership rights," but rather is to grant job rights to an employee to which he

[3] Indeed, in the performance of their function as representative of all the employees in the unit the union officials would have had an obligation (though it is not necessarily one enforceable by the Board, cf. *N.L.R.B.* v. *Miranda Fuel Company,* 326 F.2d 172, CA 2) to utilize all the facts available in determining what employees had retained seniority. For if an employee is improperly allowed to retain seniority he would displace another employee (here, approximately the 61st on the list) who is entitled to the job.

[4] On this point the Court of Appeals' understanding of *Radio Officers* seems to have been correct but it misunderstood the nature of the bylaw. The Court said that the Union "could have punished Fisher for circumventing the withdrawal card rules by taking appropriate intra-union disciplinary action. But Fisher's job was shielded from his obligations to the Union, with but a single exception." (App. A, p. 6a, *infra.*) The Court erred in its view that the by-law is of a kind which can be "circumvented" with intra-union penalties imposed against members who do so.

would not be entitled under the collective agreement merely because the Union has a membership rule dealing with the subject.

Nor can the Board's conclusion that the Union violated the Act be sustained on the basis of its "finding"[5] on motivation. Indeed, the Court of Appeals' disposition of that finding on review gives rise to an independent reason for certiorari. The Board's finding on motivation was as follows:

> "The Respondent's real purpose, I find, was to enforce as a condition of employment its by-law provision that by obtaining a withdrawal card a member withdrew 'from holding or seeking employment' within the work or geographic jurisdiction of the Respondent, and thereby to encourage employees to remain active members of the Union." (JA p. 187)

We submit that in reviewing this determination the Court of Appeals failed to follow the standards of review which have been delineated by this Court. If this assessment is correct then certiorari is plainly warranted. See, e.g. *Labor Board* v. *Walton Manufacturing Co.*, 369 U.S. 404, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374; *FCC* v. *Schreiber*, 381 U.S. —, 33 LW 4492. That it is indeed correct we shall now show:

(a) The quoted conclusion regarding motivation simply does not follow from the factual finding of what the Union did which was quoted at p. 10, *supra*. The

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[5] The reviewability of a motivation determination does not, of course, depend on its characterization by the Board, but on the statutory standards as explicated by this Court and discussed in the text. Cf. *Baumgartner* v. *United States*, 322 U.S. 665, 670-71. Accordingly, we will not quibble with its use of the word "find".

determination of the Union's or Employer's true motive, which is controlling under *Radio Officers,* is of course subject to the scrutiny of the reviewing Court, as was again shown in *Labor Board* v. *Brown,* 380 U.S. 278 and *American Shipbuilding* v. *Labor Board,* 380 U.S. 300. Yet the Court of Appeals did not consider whether this finding was supported by substantial evidence on the record as a whole, as *Universal Camera* v. *Labor Board,* 340 U.S. 474 requires. Rather, it attributed to the Board a determination that specific proof of motive was unnecessary:

> "It has long been clear that specific proof of intent to encourage union membership is unnecessary where the Employer's conduct inherently has such effects. *Radio Officers', supra,* 347 U.S. at 45, 74 S.Ct. 323. We cannot say that it was unreasonable for the Board to conclude, especially in light of its expertise in labor disputes, that Ward's subservience to the Union in refusing to reinstate Fisher because he had secured a withdrawal card would serve in the future to encourage fellow workers to remain *active* Union members during a strike and to discourage transfers to sister locals." App. A, p. 7a, *infra.* Court's emphasis)

On the same premise the Court of Appeals placed the burden of proof on the issue of motive *on the union* though it did not dispute that the Union "honestly believed Fisher had 'quit' ". App. A, pp. 7a-8a, *infra.* We find nothing in the Board's decision which suggests that it concluded that the Union's conduct had an inherent illegal effect. Yet even if the Court is right in its interpretation of the Board's decision it is undisputable that the Board failed to disclose the basis of its determination that the Union's conduct fell into the narrow class of cases discussed in *Radio*

Officers, 347 U.S. at 45 in which specific evidence of intent is unnecessary. Compare *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 224, 227 with *Labor Board* v. *Brown,* 380 U.S. 278, 286-290. Since the correctness of such a determination is a question of law subject to judicial review,[6] the Court of Appeals was at the very least required to remand the case to the Board for further elucidation of its reasoning. *Labor Board* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438; *SEC* v. *Chenery Corp.,* 318 U.S. 80; 332 U.S. 194. The necessity for a fuller explanation by the Board is emphasized rather than eliminated by the Court of Appeals' express reliance on the Board's "expertise in labor disputes." Compare *Labor Board* v. *Metropolitan Life Insurance Co., supra,* at 443; *Phelps Dodge Corp.* v. *N.L.R.B.,* 313 U.S. 177, 197. On the other hand if our interpretation of the Board's decision is correct then the Court of Appeals was in error because it affirmed the Board's decision on grounds other than those on which it rested. *SEC* v. *Chenery Corp., supra; Burlington Truck Lines* v. *U.S.,* 371 U.S. 156, 168-169.

(b) The Board's decision makes it impossible to determine whether the found motive is illegal under the Act. The Board nowhere states what it means when it says that the Union sought "to encourage em-

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[6] See e.g. *Labor Board* v. *Brown, supra,* particularly at 290-292. That the Court of Appeals did not even begin to consider this question of law is clear on the face of its opinion. If the question had been adequately considered and decided below, it would be of sufficient importance to warrant review here, particularly because of the prevalence of such by-law provisions, see pp. 16-17, *infra.* The Court's failure to perform this duty should not immunize its judgment from review.

ployees to remain *active* members of the Union." (JA p. 188, emphasis supplied). We know what is *not* meant by "active membership." It does not mean refusing to work at the Company's Newark plant during the strike. The General Counsel alleged that this was a motivation of the Union's conduct but the Trial Examiner expressly found that this allegation was not supported by the record (JA 187, n.4).[7] The fortuity that the Union used the term "active membership" in its by-law is surely insufficient to warrant a conclusion that its purpose was to encourage "participation in union activities" within the meaning of *Radio Officers,* 347 U.S. at 40. Indeed the very existence of the by-law enables a member to withdraw from Union activities without suffering the internal consequences of outright resignation from the Union, such as the requirement of an initiation fee if he joins another local. Thus, even if the Board had properly found that the Union's purpose was to enforce the by-law, it could not be said that this purpose was one proscribed by § 8(a)(3) and § 8(b)(2). Here again, the majority below failed to require the Board to properly explicate the basis of its decision, despite the fact that Judge Friendly expressly observed the inappropriateness of the Board's and the Court's reliance on the word "active" in the Union's by-law. App. A, pp. 10a-11a, *infra.* If the Board and the Court had focussed on precisely what membership activities were being encouraged by the by-laws which the Union purportedly was enforcing it would have been necessary for them to consider next whether these constitute "membership" within § 8(a)(3) as interpreted in *Radio Officers.* See n. 2 and

[7] The General Counsel excepted to this finding but the Board permitted it to stand.

6, *supra*. We do, of course, know what the true function of the withdrawal card provisions is. These provisions balance the conflicting interests in reducing work competition among members of the International Union from different jurisdictions and preserving mobility to the members.[8] The latter objective plainly contravenes no statutory objective, and the Board has repeatedly held that the reduction of work competition is a legitimate Union objective which may be accomplished even by causing employers to refuse to hire or reduce the seniority of employees.[9] There is, therefore, no readily imaginable basis for concluding either that the union had a purpose to encourage active membership or for concluding that such "active membership" (whatever that may mean) is "membership" within the meaning of the statute.

In sum, the Board's decision, which was sanctioned by the Court of Appeals, raises a substantial and recurring question whether this Court's decision in *Radio Officers* v. *Labor Board* has been misapplied. The Board's expansion of *Radio Officers* to find a violation of the Act because a Union rule is involved in the interpretation of an agreement, though no one is being punished for disobeying such a rule, penalizes

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[8] See Ulman, *The Rise of the National Trade Union* (Harvard Univ. Press, 1955) pp. 76-141.

[9] See e.g. *Plaza Builders*, 134 NLRB 751; *Yonkers Contracting Corporation*, 135 NLRB 865; *Planet Corporation*, 144 NLRB 798; *Houston Chronicle Corporation*, 145 NLRB No. 153; *Townsend & Bottum, Inc.*, 147 NLRB No. 95, 56 LRRM 1350. Cf. *Cafero* v. *N.L.R.B.*, 336 F.2d 115 (CA 2) affirming 144 NLRB 1555 where the Board held that the Union had "a legitimate purpose of attempting to give the work of the trade to those who presumably needed it rather than to those who held full time positions elsewhere." 144 NLRB at 1558.

unions for the very existence of the rule. As applied in this case the Board's theory jeopardizes the continuing validity of withdrawal card provisions which are contained in identical or similar form in the constitutions of most national unions.[10] We have annexed as App. D to our petition a partial list of national unions which have provision for clearance, transfer, travel or withdrawal cards. These rules, as we observed above, are salutary and contravene no statutory objective.

II. The Board's Decision Interferes Seriously With the Collective Bargaining Process

The Board's decision raises an additional question which warrants review by this Court because the Board's answer seriously interferes with the collective bargaining process. For the Board's theory is that the legality of the parties' interpretation of a collective agreement depends on whether its factual basis is expressly spelled out in the agreement. The Trial Examiner repeatedly relies on the fact that there is nothing in the collective agreement between Ward and Local 50 which provides that a member of Local 50 who takes a withdrawal card loses his seniority or "voluntarily quits." JA pp. 183, 186 (twice), 187. The Board expressly left open "the issue of the legality of such a provision, if it were part of the contract." JA p. 178, n. 2 quoted at p. 7, *supra*. Finally, the Court of Appeals stated three times that it was critical to the decision that the contract did not provide that a person who takes a withdrawal card has quit and distinguished its own precedents on that basis. (App. 4a, 5a, 6a).

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[10] See Ulman, *Op. cit.* n. 8, *supra*, pp. 68-152; Peterson, *American Labor Unions* (Harper & Row, 2d ed., 1963) pp. 90-91.

It is clear on the face of the statute that the legality of a Union's and an employer's conduct under § 8(a)(3) is unaffected by whether their action is based upon the explicit terms of a collective bargaining agreement. The sole exception is that the first proviso to § 8(a)(3) provides a defense where the parties have entered into a union security agreement within the terms of that proviso.[11] In § 8(d) Congress requires the parties "to confer in good faith with respect to wages, hours and other terms and conditions of employment, for the negotiation of an agreement *or any question arising thereunder* * * *" (Emphasis supplied). Cf. § 203(d) The resolution of grievances is part and parcel of the collective bargaining process and the conclusions reached by the parties are no more nor less subject to attack under § 8(a)(3) depending on the stage of the collective bargaining process when the determination is reached. This Court in *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-582, discussed at length why provisions like collective agreements necessarily contain large areas of uncertainty. Indeed, the parties often find it easier to reach agreement on a contract without a strike because they know that they need not anticipate all questions which might arise during its life.

[11] Such an agreement is, of course, present here. We think the existence of the Union security clause is not necessary as a defense since we believe that there was no discrimination to encourage membership within the meaning of § 8(a)(3). But if these terms are broadly read, as the majority below and Judge Friendly apparently read them, then we agree with the dissent that the Board cannot escape the dilemma that the term "membership" must mean in the first proviso what it means in the statute proper.

This Court has had repeated occasion to remind the Board and Courts of Appeals that the terms of collective agreements are for the parties themselves to decide. *Labor Board* v. *American National Insurance Co.*, 343 U.S. 395, 404; *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 108; *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295; *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 490, 498; *Teamsters Union* v. *Labor Board*, 365 U.S. 667, 676-677. The extent to which the rules governing seniority and other employee prerogatives are to be spelled out in the agreement or left open for subsequent elaboration is no less a matter for the parties' judgment during bargaining than whether or not there should be a no-strike clause or an exclusive hiring hall. Yet in *Miranda Fuel Company*, 140 NLRB 161 *reversed* 326 F.2d 172 (CA 2) the Board found a violation because a seniority dispute had been resolved on grounds not spelled out in the agreement; here the Board rested on the additional element that the Union relied on its by-law in interpreting the phrase "voluntary quit" in agreement. The Board's theory is utterly without statutory foundation. The importance of the issue cannot be overemphasized. It is obvious that the bargaining process will be seriously inhibited if the resolution of an issue under an agreement can be held illegal because its factual basis is not expressly spelled out therein.

CONCLUSION

By reason of the foregoing this petition for certiorari should be granted.

Respectfully submitted,

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June 14, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96—September Term, 1964.

(Argued October 22, 1964 Decided November 24, 1964.)

Docket No. 28691

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO, *Respondent*.

Before:

FRIENDLY, KAUFMAN and ANDERSON, *Circuit Judges*.

KAUFMAN, *Circuit Judge:*

We are called upon here to decide whether certain union action caused an employer to make a "discriminatory" decision, the ultimate effect of which was to "encourage" or "discourage" union membership. The problem is before us on the National Labor Relations Board's petition for enforcement of its order, based upon a trial examiner's findings and conclusions that Local 50, American Bakery & Confectionery Workers Union, AFL-CIO (the Union), violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act, 29 U. S. C. §§ 158(b)(2), 158(b)(1)(A), by causing Ward Baking Company to refuse to reinstate Charles Fisher on the ground that he had procured a withdrawal card from the Union.

Section 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer" to violate Section 8(a)(3) "by discrimination in regard to hire or tenure of employment . . . [which] encourage[s] or discourage[s] membership in any labor organization." Section 8(b)(1)(A) bars unions from restraining or coercing workers in the exercise of Section 7 rights, including the right to refrain from union activities. The Board's order, which we enforce, contains the usual cease and desist and notice provisions, as well as a requirement for back pay.

The sequence of events leading to the present proceeding commenced September 1, 1963, when the Union called a strike at Ward's Bronx plant to protest the management's decision to transfer bread and doughnut production to a New Jersey unit. Fisher, who had been employed at the Bronx plant for almost thirty years, was a Union member, and, as such, joined the strike and picketed for some time. On September 22, however, while the Bronx strike was still in progress, he successfully sought work at Ward's Newark plant—a separate bargaining unit represented by the Union's sister local, Number 84. At that time, he was told by Ward's Newark personnel manager that his Newark job was "temporary" and that he could return to his position in the Bronx when the strike ended.

Despite his "temporary" status, however, Fisher was soon requested to join and pay dues to Local 84. Accordingly, on October 29 Fisher sought and obtained a withdrawal card from the Union, ostensibly so that he might transfer his membership to the Newark local and avoid paying a new initiation fee.

On November 7, the Bronx strike ended, and Ward's Bronx personnel manager, John F. McGuire, met with Union representatives on the following day to arrange the order of recall of workers. Since the bread and doughnut departments had been permanently terminated, the Union and employer conferees faced a complex problem; senior

employees in those departments would have to be assigned other jobs. In light of this fact, and since only about 60 of the approximately 450 employees in the Bronx plant were to be recalled immediately, the parties at the November 8 conference decided to consult a consolidated plant-wide seniority list in determining the order of recall.

With this *modus operandi* agreed upon, Fisher's name was reached in due course at number thirty-five on the seniority list. At this point, Louis Genuth, the Union's secretary-treasurer, advised McGuire that Fisher "had taken a transfer card and . . . was not entitled to recall." As a result of this advice, McGuire scratched Fisher's name from the list, and he was accordingly not rehired.

News of this action did not immediately reach Fisher, and when he was discharged from his Newark job, sometime during the following week, he went to the Bronx plant, seeking reinstatement. It was at this juncture that McGuire advised him that Ward was ready and willing to rehire him, but that the Union had objected.[1] Although Fisher subsequently sought to persuade Union officials to withdraw their objections to his recall, he was finally told that he was no longer a member of the Union and hence out of a job.

The Union does not seriously challenge the foregoing summary of relevant facts, as found by the trial examiner. Rather, in an attempt to justify its conduct, the Union points to a provision of the collective bargaining agreement specifying that seniority rights would terminate if an employee "voluntarily quit." Relying on this provision, the Union contends that Fisher in fact had terminated his employment at the Bronx plant when he received a withdrawal card on October 29.

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[1] To ensure that Ward would continue to abide by Genuth's instructions, the Union's shop steward and one of its business agents separately told McGuire, within the next few days, that Fisher was not to be reinstated because he had received a withdrawal card.

At the outset, we are able to dismiss several of the Union's contentions without extensive discussion. Thus, we cannot attach the requested significance to a provision in the Union's international constitution and bylaws that "a withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union." As the trial examiner correctly found, this provision had not become a part of the contract between Ward and the Union, either by direct incorporation or by custom and practice.

Neither can we accept the Union's suggestion that its opposition to Fisher's reinstatement was motivated by his alleged statement, in securing the withdrawal card, that he had "quit" the Bronx plant. The trial examiner, having observed the witnesses, did not credit the testimony supporting this theory, and we find his conclusion on this score supported by substantial evidence on the record as a whole. See *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951).[2]

The difficult issue for our determination is whether Fisher's loss of seniority involved the sort of "discrimination" which "encourages" membership in a labor organization

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[2] There was testimony, for example, that the Union's representatives clearly stated to Personnel Manager McGuire that Fisher's ineligibility for recall stemmed from his request for and receipt of a withdrawal card and nothing else. Moreover, it was undisputed that Fisher did not, before or after the November 8 meeting, inform Ward's Bronx management that he was terminating his employment at that plant. Indeed, McGuire testified that he first learned that Fisher was working in Newark from Genuth, the Union's secretary-treasurer, at the November 8 conference. Finally, Fisher himself testified that he had not been informed that the acquisition of a withdrawal card signified his intention to leave either his job or the Union.

within the meaning of Sections 8(b)(2) and 8(a)(3). Our guidelines for resolving these questions are taken from *N. L. R. B.* v. *Local 294, I. B. T.*, 317 F. 2d 746 (2d Cir. 1963), where Judge Hays wrote that a union does not violate 8(b)(2) unless the "discrimination" which it seeks would constitute a violation of 8(a)(3) if the employer acted without suggestion or compulsion. See also *N. L. R. B.* v. *Local 776, IATSE (Film Editors)*, 303 F. 2d 513, 516 (9th Cir. 1962).

We must first determine, therefore, whether Ward "discriminated" against Fisher by refusing to reinstate him. Central to such an inquiry is a proper definition of the sort of "discrimination" which the Act prohibits. Stated concisely, we believe that an employee is unlawfully "discriminated" against when a distinction is made arbitrarily or without sound basis and to his detriment. See *N. L. R. B.* v. *Miranda Fuel Co.*, 326 F. 2d 172, 181 (2d Cir. 1963) (Friendly, *J.*, dissenting). It is clear to us, moreover, that the provisions of the Labor Act under consideration are meaningful only if they are read to forbid such "discrimination" not only between union members and non-members or between good members and bad members but in all decisions which depend primarily upon union membership consideration. Cf. *Local 357, I. B. T.* v. *N. L. R. B.*, 365 U. S. 667, 682 (Harlan, *J.*, concurring).

When viewed in this context, we believe that the Board was well within the province of its expertise in drawing the inference that an unlawful form of "discrimination" was practiced. See *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 227 (1963). It is readily apparent to us that Fisher lost his job because the Union caused Ward to enforce a Union rule that was not incorporated in the collective bargaining agreement; his employment would not have terminated without the Union's pressure and cajoling. These acts, it seems to us, establish that Ward's conduct,

resulting from the Union's causation, was arbitrary and without sound basis.

The Union directs our attention to a number of recent cases which it asserts support its position. See *Local 357, I. B. T.* v. *N. L. R. B.*, 365 U. S. 667 (1961) (hiring halls); *Cafero* v. *N. L. R. B.*, —— F. 2d —— (2d Cir. Aug. 27, 1964) (moonlighting); *N. L. R. B.* v. *Miranda Fuel Co.*, 326 F. 2d 172 (2d Cir. 1963) (violation of leave provisions); *N. L. R. B.* v. *Local 294, I. B. T.*, 317 F. 2d 746 (2d Cir. 1963) (work rotation rules). But in our opinion such decisions are not apposite. There is a vital distinction between this case, where the Union's withdrawal card rules were not incorporated in the collective bargaining agreement with Ward, and the cited cases, where Union and employer actions were predicated upon express contract provisions. Indeed, in *Local 357, supra*, the contract specifically provided that there would be no discrimination against employees because of the presence or absence of union membership.

It is of interest that basic to the National Labor Relations Act is an overriding policy to insulate employees' jobs from their organizational rights. To achieve this goal, Sections 8(a)(3) and 8(b)(2) were designed to allow workers to exercise freely their right to join unions, to be good, bad, or indifferent members, or to abstain from joining any union without imperiling their right to a livelihood. *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17 (1954). This is not to say that the Union could not have punished Fisher for circumventing the withdrawal card rules by taking appropriate intra-union disciplinary action. But Fisher's job was shielded from his obligations to the Union, with but a single exception. Thus, the statute explicitly states that a Union commits an unfair labor practice when it causes an employer to discriminate against an employee "on some ground *other than* his failure to tender the periodic dues and initiation fees uniformly required . . ." 29 U. S. C.

§ 158(b)(2). (Emphasis added.) Here there is no question but that Fisher's dues were current.[3]

Finally, it seems to us that the Board could reasonably conclude that Ward, by refusing to reinstate Fisher, was under the foregoing circumstances "encouraging" union membership. See *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 51 (1951). It has long been clear that specific proof of intent to encourage union membership is unnecessary where the employer's conduct inherently has such effects. *Radio Officers', supra*, at 45. We cannot say that it was unreasonable for the Board to conclude, especially in light of its expertise in labor disputes,[4] that Ward's subservience to the Union in refusing to reinstate Fisher because he had secured a withdrawal card would serve in the future to encourage fellow workers to remain *active* Union members during a strike and to discourage transfers to sister locals.

Several additional contentions by the Union require brief discussion. We are told that *Local 294, supra*, and *Miranda Fuel, supra*, compelled the Board to carry the burden of proving the Union's illegal motivation. From this premise, the Union argues that it did not intend to cause forbidden discrimination because it honestly believed Fisher had "quit." But the Union reads too much into our previous decisions. In *Local 294* we simply held that a union does not commit an unfair labor practice by inducing an employer to make a *non-discriminatory* decision against an

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[3] If Fisher had fallen behind in dues payments to Local 50 while working in Newark, the first proviso of § 8(a)(3) might, as the dissent suggests, be applicable. But that situation is not before us; the proviso speaks of failing to tender periodic dues payments, and not in terms of suspending a future "obligation" to pay dues.

[4] "The Board knows the facts of life in the labor world better than we ever can; we ought not upset its conclusion as to 'encouragement' unless we can say this is without rational basis." *N. L. R. B.* v. *Miranda Fuel Co.*, 326 F. 2d 172, 184 (Friendly, J., dissenting).

employee. Its teaching, therefore, does not apply to a case in which, as here, discrimination is established. *Miranda Fuel* is not in point for somewhat different reasons. It is true that Judge Medina's scholarly opinion suggests that an unfair labor practice is committed only if discrimination is "deliberately designed" to encourage union membership. But, in order to give that language its proper weight, it must be placed in context. When we do so, we note that the real issue in *Miranda* was whether a union committed an unfair labor practice by arbitrary action which "could not conceivably have been thought to encourage union membership, because [the employee's] demotion affected union and non-union men alike," 326 F. 2d at 176; the union's motivation, as we read the case, was not really in issue. Finally, as we have already indicated, these cases must be read in the light of the Supreme Court's holding in *Radio Officers' supra*, that specific proof of intent is unnecessary where, as here, conduct inherently encourages union membership.

As a final measure, the Union argues that it did not "cause or attempt to cause" forbidden conduct because Ward could have resisted its demand that Fisher lose his seniority by seeking arbitration. Such a contention borders on the frivolous. First, substantial evidence supports the trial examiner's finding that Ward acted *solely* because of the suggestions and advice of the Union's representatives at the November 8 conference and in subsequent conversations with Personnel Manager McGuire. This finding establishes the requisite causation under Section 8(b)(2). Cf. *N. L. R. B.* v. *International Union of Operating Engineers*, 216 F. 2d 161 (8th Cir. 1954). Secondly, it seems to us that Section 8(b)(2) would have no force if a union's conduct were excusable simply because the employer *might* have resisted the union's desires by resorting to arbitration. Speculation as to the will or ability of a given employer to withstand union pressure can have no place in an area of the law already overburdened with hypothetical conjectures remote from the realities of industrial existence.

The Board's order is enforced.

FRIENDLY, *Circuit Judge* (dissenting):

The trial examiner's report, which the Board adopted, holds that a labor organization having a valid union security contract violates the first clause of § 8(b)(2), forbidding it to cause an employer by discrimination to encourage union membership, if it causes the employer to withdraw seniority from an employee who has taken advantage of a bylaw permitting him to avoid the payment of dues if he is willing to sacrifice his position as an active union member and as an employee. No administrative expertise or appropriate judicial deference to it can square such a result with a reasonable construction of the statute.

The supposedly offending provisions are those in Article XIV of the Local's and Article XIX of the International's By-Laws, both relating to withdrawal cards. Having the right to insist that a member continue the payment of his dues under any and all conditions or forfeit his membership, the union settled for something less. A member might withdraw "from his local's rolls of active members" and thereby have his obligation to pay dues suspended while ceasing to participate in any union affairs. However, he could join any sister local or resume active membership on his own without paying an initiation fee. Assumption of this status naturally carried a penalty—the member would be deemed to have withdrawn from holding or seeking employment within the local's jurisdiction.

It is undeniable that this condition "encourages" a member not to avail himself of the option but rather to continue as a dues-paying member of the local under whose jurisdiction he has been working. But § 8(a)(3) clearly contemplates that this "encouragement," although no other, is permissible where there is a valid union security contract.[1]

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[1] Boston's case, dealt with in *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 42 (1954), is distinguished by the absence of a valid union security contract, as well as by the fact that the union did not terminate Boston's status as a member.

Congress' determination "to insulate employees' jobs" from union efforts to reward "good" members or to punish "bad, or indifferent" ones, *Radio Officers' Union* v. *N. L. R. B.*, 347 U.S. 17, 40 (1954), was paralleled by its recognition of "the validity of unions' concern about 'free riders,' i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason," 347 U. S. at 41. Here the first proviso of § 8(a)(3) was met and the second was inapplicable.

When the first proviso allows an employer and a labor organization to require "membership therein" as a condition of employment, it surely permits a requirement of dues-paying membership, and the collective bargaining agreement between Ward and the union demanded exactly that.[2] Fisher, by acquiring a withdrawal card, voluntarily ceased to be a dues-paying, participating member of the union; the union bylaws already mentioned unequivocally provided this route for severing these basic ties with the union,[3] and Fisher took it as surely as if he had submitted a letter of resignation. By so doing, he laid himself open to job and consequent seniority loss under the security clause. I cannot believe anything should turn on the inept language specifying withdrawal from the "rolls of *active*

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[2] "All present employees shall, as a condition of continued employment, maintain their membership in the Union [Local No. 50] during the life of this agreement through regular payment of dues to the Union."

[3] "A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union. The holder of a withdrawal card shall be exempt from the payment of union dues and shall not be permitted to participate in local union meetings."

members" when the remainder of the section made it clear that membership itself was being abandoned, saving only the initiation fee protected by another section.

The second proviso says, "That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condtion of acquiring or retaining membership." The language, supported by the legislative history (H. R. 3020, 80th Cong., 1st Sess. § 8(d)(4) (1947) (passed by the House); S. Rep. No. 105, 80th Cong., 1st Sess. 20 (1947)), makes it clear that "terminated" refers to actions initiated by the union, such as expulsion, not by the employee.[4]

I would deny enforcement.

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[4] This answers the point made in the footnote to the majority opinion which relies on a partial quotation of similar language in the second clause of § 8(b)(2).

APPENDIX B

Decision and Order

On March 26, 1963, Trial Examiner Ivar H. Peterson issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Union had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the Act the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, and the entire record in the case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

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[1] The Respondent's request for oral argument is hereby denied as the record, exceptions, and briefs adequately present the issues and position of the parties.

[2] As set forth in the Intermediate Report, the Respondent's bylaws and the constitution of its International each contain a provision which states: "A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union." In view of the specific findings of the Trial Examiner, which we are adopting, that the provision in question was not in the contract between the Respondent and the Company and, therefore, cannot avail the Respondent as a defense, we do not reach or pass upon the issue of the legality of such a provision, if it were a part of the contract.

ORDER

The Board adopts as its Order the "Recommended Order" of the Trial Examiner with the following amendments:

(1) Paragraph 2(a) of the Recommended Order shall be amended to read as follows:

> Notify Ward Baking Company in writing, and send a copy thereof to Charles Fisher, that it has withdrawn the objection to the reinstatement of the said Charles Fisher which was expressed by the Union beginning November 8, 1962, and that it has no present objection to his reinstatement.

(2) The paragraph of the Notice[3] beginning "WE WILL notify etc." shall be amended to read:

> WE WILL notify WARD BAKING COMPANY that we withdraw our objection to the reinstatement of Charles Fisher, which we expressed beginning November 8, 1962, and that we presently have no objection to his reinstatement, and we will serve a copy of said notice on Charles Fisher.

Dated, Washington, D. C., June 27, 1963.

PHILIP RAY RODGERS, *Member,*
JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
(SEAL) NATIONAL LABOR RELATIONS BOARD

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[3] Below the double line, the penultimate sentence is changed to read "This Notice must remain posted for 60 consecutive days from the date of posting, * * * " instead of stating "60 consecutive days from the date hereof."

Intermediate Report and Recommended Order

Statement of the Case

Upon a charge filed on November 16, 1962,[1] by Charles Fisher, the General Counsel of the National Labor Relations Board, by the Regional Director for the Second Region, issued a complaint on December 28, alleging that Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, herein called the Respondent or the Union, had engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act in that it had caused Ward Baking Company, herein called the Company, to discriminate against Fisher in violation of Section 8(a)(3) by causing the Company to refuse to reinstate Fisher. In its answer, the Respondent denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me, as duly designated Trial Examiner, in New York, New York, on January 24, 1963. The General Counsel and the Respondent were represented by counsel and participated in the hearing. Counsel for each of the parties presented oral argument at the conclusion of the hearing, and briefs have been received from both, which have been considered.[2]

Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Employer

Ward Baking Company, a New York corporation with its principal office at 475 Fifth Avenue, New York, New York, is engaged in the production, sale and distribution

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[1] All dates refer to 1962, unless otherwise indicated.

[2] By order dated February 18, 1963, a stipulation of the parties and an attached agreement were received in evidence as Joint Exhibit 1-A.

of bakery goods and related products at various plants in New York, New Jersey and Maryland, including its Bronx, New York, plant which is involved in this proceeding. During the past year, which is a representative period, the Company shipped products valued in excess of $50,000 from its plants to States other than the State in which the plants are located. I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

At issue here is the legality of the Union's action in causing the Company to refuse to reinstate the complainant, Charles Fisher, at the conclusion of a strike, confined to the Company's Bronx plant which began September 1 and ended November 7. Fisher, who had been employed at the Bronx plant since November 1932, most recently in the maintenance department, was a member of the Union, joined the strike, and picketed. On September 22, during the strike, he obtained employment at the Newark plant of the Company, which is a separate bargaining unit represented by the Union's sister local, Local 84. On October 29 Fisher requested and obtained a withdrawal card from the Union. The strike ended on November 7 with the signing of a settlement agreement by which the basic agreement that had terminated on August 31 was renewed, effective September 1, with modifications. The following day, November 8, representatives of the management and the Union met for the purpose of arranging for the recall of employees, which involved problems of job placement as

well as order of recall occasioned by the fact that certain operations of the Company at the Bronx plant were being curtailed or discontinued. Since only about 60 out of the approximately 450 employees were to be recalled immediately, the parties at the November 8 conference used a consolidated plantwide seniority list in determining the order of recall. When Fisher's name (35th on the list) was reached, the Union took the position that he had obtained a "transfer" or withdrawal card and was not entitled to recall. Accordingly, his name was scratched on the list and he was passed over. Sometime during the week following November 8, Fisher was informed that he was being laid off from his job at the Newark plant. He then went to the Bronx plant to inquire about reinstatement. John F. McGuire, the personnel manager, who had participated in the November 8 conference, told him that although the Company was willing to put him back to work in the Bronx plant the Union objected. Within the next few days the Union's shop steward, Angelo Vangone, and business agent, Jack Killoran, separately told Personnel Manager McGuire that Fisher was not to be brought back to work because he had obtained a withdrawal card from the Union.

The complaint alleges that the Respondent caused the Company to discriminate against Fisher because Fisher "had obtained a withdrawal of membership card from Respondent" and/or "worked for Ward during the strike." The Respondent, while not disputing that it objected to Fisher's reinstatement, contends that he quit his employment at the Bronx plant and, in consequence, lost his seniority and his right to be reinstated upon termination of the strike. In support of its position, the Respondent relies upon a provision in the international constitution (article XIX, section 1) and in its bylaws (article XIV, section 1) which states: "A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and *has withdrawn from holding or seeking employment within the work or geographic juris-*

diction of this International or his local union'' (Emphasis supplied). Admittedly, this provision had not been incorporated into the collective-bargaining agreement with the Company; however, the Union argues in its brief that by custom and practice the withdrawal card provisions quoted above "had become part of the seniority agreements of the local union in its relations with the employers with whom it had collective bargaining agreements." In addition, and apart from its reliance on the withdrawal card provision in its bylaws, the Respondent urges that Fisher in fact had quit his job at the Bronx plant because he so informed the Union on October 29 when he obtained his withdrawal card.

Fisher testified that when he was hired by the Newark personnel manager he was told that the job was temporary and that he would have his job at the Bronx plant when the strike ended. It is undisputed that Fisher did not, prior to or after the November 8 meeting, inform the Bronx management that he was quitting his employment at that plant; indeed, Personnel Manager McGuire testified that he first learned Fisher was working at the Newark plant during the November 8 conference when he was so informed by Louis Genuth, secretary-treasurer of the Respondent. Moreover, McGuire stated that but for the Union's objection Fisher "would have been advised to report either November 11th or the 18th when the bulk of the other employees were notified to report." Tim McIntyre, a business agent of the Respondent, testified that Fisher, when he appeared at the Union's offices on October 29 to secure a withdrawal card, stated to McIntyre that his job at the Newark plant was permanent and, in response to McIntyre's inquiry whether that meant he had left his employment at the Bronx plant, answered that it did. McIntyre further testified that he apprized Secretary-treasurer Genuth, Shop Steward Vangone, and Business Agents Killoran and Huller of the substance of his conversation with Fisher, telling them that Fisher "had told me that he was

quitting his job in the Bronx, and that he had come over to our office for a withdrawal card to Local 84."

The purport of McIntyre's testimony regarding his conversation with Fisher on October 29, as summarized above, is that Fisher's statement that he had quit the Bronx plant, rather than his action in securing a withdrawal card, was the significant factor motivating the Union's subsequent opposition to his reinstatement. However, at the November 8 conference, which was not attended by McIntyre, Genuth told Personnel Manager McGuire, when Fisher's name was reached on the seniority list, according to McGuire's uncontradicted testimony, that Fisher "had taken a transfer card and * * * was not entitled to recall * * *." A few days later, again as testified by McGuire and not controverted by any witness of the Respondent, both Shop Steward Vangone and Business Agent Killoran informed McGuire that Fisher was not to be reinstated because he had taken out a withdrawal card. In these conversations with McGuire, the Union's representatives clearly stated that Fisher's ineligibility for recall stemmed from his having obtained a withdrawal card; they did not attribute his loss of employment rights to any other independent act or statement on his part. I credit the testimony of Fisher and McGuire and find that Fisher did not tell McIntyre that he had quit the Bronx plant or that his job at the Newark plant was permanent; I further find that the Union's representatives told Personnel Manager McGuire that Fisher was not to be recalled because he had taken out a withdrawal card from the Union and thus had quit his employment.[3]

[3] Fisher testified that he came to the Union's office on October 29 to pay his dues; that he asked McIntyre when he thought the strike might end, to which McIntyre replied, "I don't know; maybe never"; and that he then determined to secure a withdrawal card. McIntyre, on the other hand, testified Fisher told him he had been sent by a delegate of Local 84 to obtain a withdrawal card. On this aspect of their conversation I credit McIntyre

(c) Seniority rights shall terminate if an employee:

(I) voluntarily quits

(II) is discharged for just cause

(III) fails to return to work within (7) days notice by registered or certified mail to his last known address (unless unable to because of illness of which the company receives written notice). A copy of the company's notice shall be simultaneously served by mail upon the Local Union.

(IV) is laid off for the following period of time: employee with less than 3 years continuous service—60 days.

employees with more than 3 years continuous service and less than 4 years—90 days.

employees with more than 4 years continuous service and less than 5 years—120 days.

employees with more than 5 years continuous service—180 days.

(V) In the event of the permanent shut-down of a department of any plant the employee who is laid off shall retain seniority for a period of one year for purpose of recall only.

There is nothing in the foregoing contractual provision that can reasonably be said to have had the effect of terminating Fisher's seniority. He had not voluntarily quit, had not been discharged for cause, had not failed to return

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and find that Fisher's purpose in visiting the office was to arrange to transfer his membership to Local 84. Although the record does not disclose whether Local 84 had a union shop agreement at the Newark plant, I infer that Fisher, having been employed there just over 30 days, had been requested to pay dues to Local 84 and, in order to do so without paying an initiation fee, found it necessary to obtain a withdrawal card from the Union.

pursuant to notice of recall, nor had he been in layoff status for the required period. I find, therefore, in accord with this seniority provision and McGuire's testimony set forth above, that Fisher had not lost his seniority, was eligible for recall, and would have been recalled on November 11 or 18, but for the Union's insistence that he was not entitled to reinstatement. Nor is there support in the record for the contention that the provision in the Union's bylaws, that by obtaining a withdrawal card a member thereby signifies that he "has withdrawn from holding or seeking employment within the work or geographic jurisdiction of * * * his local union," had become a part of the contract between the Company and the Union, either by direct incorporation therein or by custom or practice. Secretary-treasurer Genuth admitted that the bylaw provision had not been incorporated into the agreement. Testimony adduced by the Union to the effect that employees (either of the Company or other employers subject to the same basic agreement) who had obtained withdrawal cards and were thereafter reemployed, had seniority dating only from the date of rehire, falls far short of establishing that the act of obtaining a withdrawal card, in and of itself, operated to terminate such seniority as they had accumulated prior to taking out a withdrawal card. I find that there was no contractual arrangement between the Company and the Respondent whereby the issuance of a withdrawal card to an employee, without more, served to terminate the employment relationship. As to Fisher, I find that the Respondent caused the Company to refuse to reinstate him because he had obtained a withdrawal card, and that in so doing the Respondent was not acting in compliance with any contractual provision but in derogation of Fisher's rights under the operative agreement.[4]

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[4] The complaint further alleged that the Respondent caused Fisher not to be reinstated because he worked at the Company's Newark plant during the strike. Although the matter is by no means free from doubt, I am not persuaded that an inference to that effect is sufficiently supported by the record.

The refusal of the Company to reinstate Fisher was the direct result of the position taken by the Respondent's representatives in the November 8 conference with Personnel Manager McGuire, and in subsequent conversations with him. In thus insisting that the procurement of a withdrawal card from the Union was the equivalent of a voluntary quit, a result not sanctioned by the contract but indeed contrary to its provisions governing loss of seniority, the Respondent caused the Company to discriminate against Fisher. The Respondent's real purpose, I find, was to enforce as a condition of employment its bylaw provision that by obtaining a withdrawal card a member withdrew "from holding or seeking employment" within the work of geographic jurisdiction of the Respondent,[5] and thereby to encourage employees to remain active members of the Union. Accordingly, I find that the Respondent caused the Company to discriminate against Fisher in violation of Section 8(a)(3) of the Act and that thereby the Respondent violated Section 8(b)(2) and (1)(A) of the Act.[6]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Employer described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes

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[5] Stated otherwise, what the Union's position comes down to is that only active members, excluding those who have taken out a withdrawal card, are entitled, under this provision in its bylaws, to hold or seek employment within the Union's work or geographic jurisdiction. This, it seems to the undersigned, is tantamount to attempting to maintain closed shop conditions.

[6] See *Brunswick-Balke-Collender Co.*, 135 NLRB 574; *Local 12, International Union of Operating Engineers, AFL-CIO (Engineers Limited and Pacific Pipeline Construction Company)*, 135 NLRB 1252.

burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent caused the Employer herein to refuse to reinstate its employee, Charles Fisher, in violation of Section 8(a(3) of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. It will be recommended that the Respondent notify the Employer, in writing, and serve a copy upon Fisher, that it withdraws its objection to the reinstatement of Fisher at the Bronx plant. It will also be recommended that the Respondent make whole Fisher for any loss of pay he may have suffered as a result of the discrimination against him, such backpay liability to terminate 5 days after notification to the Employer that it has no objection to Fisher's reinstatement. The amount of backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289, with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB No. 97.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Ward Baking Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By causing Ward Baking Company to refuse to reinstate its employee, Charles Fisher, in violation of Section

8(a)(3) of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Respondent, Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing of attempting to cause Ward Baking Company to discriminate against its employees in violation of Section 8(a)(3) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

(b) In any like or related manner restraining or coercing employees of Ward Baking Company in the exercise of rights guaranteed them in Section 7 of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Notify Ward Baking Company, in writing, and send copy thereof to Charles Fisher, that it has no objection to the reinstatement of the said Charles Fisher.

(b) Make whole Charles Fisher for any loss of pay he may have suffered as a result of the discrimination against him, in the manner set forth in "The remedy" section of the Intermediate Report.

(c) Post in conspicuous places in its business offices, meeting halls, and all places where notices to members are

customarily posted, copies of the notice attached hereto marked "Appendix."[7] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's authorized representative, be posted immediately upon receipt thereof and be maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Sign and mail sufficient copies of said notice to the Regional Director for the Second Region for posting by Ward Baking Company, at all locations where notices to its employees are customarily posted, if the Company is willing to do so.

(e) Notify the said Regional Director, in writing, within 20 days from the date of receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply herewith.[8]

Dated at Washington, D. C., March 26, 1963.

IVAR H. PETERSON,
Trial Examiner.

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[7] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[8] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX

NOTICE

TO ALL MEMBERS OF LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION AFL-CIO, AND TO ALL EMPLOYEES OF WARD BAKING COMPANY

PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT cause or attempt to cause WARD BAKING COMPANY to discriminate against its employees in violation of Section 8(a)(3) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT in any like or related manner restrain or coerce employees of WARD BAKING COMPANY in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL notify WARD BAKING COMPANY that we have no objection to the reinstatement of Charles Fisher, and will serve a copy of said notice on Charles Fisher.

WE WILL make Charles Fisher whole for any loss of pay he may have suffered because of our action in caus-

ing WARD BAKING COMPANY to discriminate against him.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Fifth Floor, Squibb Building, 745 Fifth Avenue, New York 22, New York (Tel. No. Plaza 1-5500), if they have any question concerning this notice or compliance with its provisions.

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreements: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee

with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *

Section 203:

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *

APPENDIX D

Partial List of International Union Constitutions With Clearance, Transfer, Travelling or Withdrawal Card Provisions

Aluminum Workers International Union

Asbestos Workers; International Association of Heat and Frost Insulators and

Automobile, Aerospace and Agricultural Implement Workers of America; International Union, United

Barbers, Hairdressers, Cosmetologists and Proprietors' International Union of America; Journeymen

Bill Posters, Billers and Distributors of the United States and Canada; International Alliance of

Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers; International Brotherhood of

Bookbinders; International Brotherhood of

Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America; International Union of United

Brick and Clay Workers of America; United

Building Service Employees' International Union

Carpenters and Joiners of America; United Brotherhood of

Chemical Workers Union; International

Communications Workers of America

Distillery, Rectifying, Wine and Allied Workers' International Union of America

Electrical, Radio and Machine Workers; International Union of

Electrical Workers; International Brotherhood of

Elevator Constructors; International Union of

Engineers; American Federation of Technical

Engineers; International Union of Operating

Fire Fighters; International Association of

Flight Engineers' International Association

Furniture Workers of America; United

Garment Workers of America; United

Glass Bottle Blowers Association of the United States and Canada

Glass Workers' Union of North America; American Flint

Government Employees; American Federal of

Iron Workers; International Association of Bridge, Structural and Ornamental

Railway Carmen of America; Brotherhood

Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of

Retail Clerks International Association

Shoe Workers' Union; Boot &

Toy Workers of the United States and Canada; International Union of Doll and

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CITATIONS

Cases:

Cafero v. *National Labor Relations Board*, 336 F. 2d 115 10

Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17 7

Statute:

National Labor Relations Act, Sections 8(b)(1)(A), (2) 5, 7, 9

781-001—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 255

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–11a) is reported at 339 F. 2d 324. The Board's decision and order (Pet. 12a–24a) are reported at 143 NLRB 233.

JURISDICTION

The decision of the court of appeals was entered on November 24, 1964 (Pet. 1a). Petitions for rehearing and for rehearing *en banc* were denied on January 15, 1965, and a decree was entered on January 18, 1965. On April 7, 1965, Mr. Justice Harlan en-

tered an order extending the time for filing a petition for a writ of certiorari to and including June 14, 1965 (Pet. 2). The petition for certiorari was filed on June 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances present in this case, the union committed an unfair labor practice by causing a member to be barred from employment pursuant to a union rule, not incorporated in the collective bargaining agreement, providing that a member who procures a "withdrawal card" from the union shall be deemed to have withdrawn from employment in the area of the union's jurisdiction.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 27a–30a of the petition.

STATEMENT

On September 1, 1963, one day after its collective bargaining contract expired, Local 50 called an economic strike at Ward Baking Company's Bronx plant. Employee Charles Fisher, a member of Local 50, joined the strike (Pet. 15a; J.A. 15–16, 33, 63).[1] He picketed for about three weeks until September 22, when he obtained employment at the Company's Newark, New Jersey plant (Pet. 15a; J.A. 14–15,

[1] "J.A." references are to the portions of the record printed as a joint appendix for the court below and filed with the petition.

51–52, 64), a separate bargaining unit represented by American Bakery Workers' Local 84 (Pet. 15a; J.A. 790). Fisher was told by Ward's Newark personnel manager that his job there was temporary and that he could return to the Bronx plant when the strike ended (Pet. 2a, 17a). Nevertheless, he was apparently requested to pay dues to Local 84 (Pet. 18a–19a, n. 3). To avoid paying an initiation fee to the Newark local, Fisher requested and obtained a "withdrawal card" from Local 50 on October 29 (Pet. 15a; J.A. 84–85, 127–128).[2]

The strike ended November 7, when agreement on a renewal of the old contract was reached (Pet. 15a; J.A. 16). The next day, Local 50 and Company officials met to determine the order of recall of the strikers. Due to the discontinuance and curtailment of some of the Company's operations, only 60 employees out of the pre-strike complement of approximately 450 could be recalled immediately (Pet. 15a–16a; J.A. 16–17, 44). Although the parties agreed to

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[2] The bylaws of Local 50 and the constitution of its International Union provide that (Pet. 16a–17a; J.A. 173, 175–176):

> A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union. The holder of a withdrawal card shall be exempt from the payment of union dues and shall not be permitted to participate in local union meetings.

The bylaws and the constitution further provide that, upon depositing his withdrawal card "with any local union, a member shall be re-admitted to active membership without the payment of a new initiation fee" (J.A. 174, 177).

recall in order of seniority,[3] and to use a consolidated plantwide seniority list, Fisher, who was 35th on the list, was not recalled (Pet. 16a; J.A. 17). When Fisher's name was reached, Union Secretary-Treasurer Genuth told Plant Manager McGuire that Fisher "had taken a transfer card and * * * was not entitled to recall" (Pet. 16a, 18a; J.A. 18–19). For that reason, Fisher's name was scratched from the seniority list (*ibid.*).

The following week, Fisher was laid off from the Newark plant (Pet. 16a; J.A. 81–82). He went to the Bronx plant to ask for reinstatement, but was told that, although the Company was willing to put him back to work, Local 50 had objected (Pet. 16a;

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[3] The seniority provisions of the contract read (Pet. 19a):

(c) Seniority rights shall terminate if an employee:

(I) voluntarily quits.

(II) is discharged for just cause.

(III) fails to return to work within (7) days notice by registered or certified mail to his last known address (unless unable to because of illness of which the company receives written notice). A copy of the company's notice shall be simultaneously served by mail upon the Local Union.

(IV) is laid off for the following period of time:

employee with less than 3 years continuous service—60 days.

employees with more than 3 years continuous service and less than 4 years—90 days.

employees with more than 4 years continuous service and less than 5 years—120 days.

employees with more than 5 years continuous service—180 days.

(V) In the event of the permanent shut-down of a department of any plant the employee who is laid off shall retain seniority for a period of one year for purpose of recall only.

J.A. 66). According to Company Personnel Manager McGuire, if the Union had not objected, Fisher "would have been advised to report either November 11th or the 18th when the bulk of the other employees were notified to report for work" (J.A. 19, 51). A few days later, Union officials Vangone and Killoran again told McGuire that Fisher was not to be returned to work because he had obtained a withdrawal card from Local 50 (Pet. 16a, 18a; J.A. 20–21). When Fisher subsequently went to the offices of Local 50 to ask its officials to remove their objections to his recall, he was told that he was no longer a member of the Local (J.A. 68).[4]

The Board found that the union rule that an employee who obtained a withdrawal card signified that he had withdrawn from employment in the area was not incorporated in the collective bargaining agreement between Local 50 and the Company.[5] The Board further found that Local 50 had caused the Company to refuse to reinstate Fisher, not because he had voluntarily quit, but in order to enforce its rule on withdrawal cards, and that such discrimination would tend to encourage employees to remain active members of Local 50 during strikes. Accordingly, the Board concluded that Local 50 had violated Section 8(b)(2) and (1)(A) of the Act (Pet. 12a, n.2, 19a–21a). The Board ordered Local 50 to

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[4] Fisher, however, was current in his dues payments to Local 50 (J.A. 68, 82–83, 85).

[5] Indeed, Secretary-Treasurer Genuth, who first advised the Company that Fisher should not be recalled, admitted that the bylaw provision had not been incorporated in the contract (Pet. 20a).

cease and desist from the unfair labor practice found, to make Fisher whole for any loss of pay resulting from the discrimination against him, and to notify the Company that it had withdrawn its objection to Fisher's reinstatement (Pet. 13a, 23a–24a).

The court of appeals (Judge Friendly dissenting) enforced the Board's order in full (Pet. 1a–11a).

ARGUMENT

The holding of the court below turns on the facts of this particular case and is in accord with settled authority. There is thus no occasion for further review.

1. The petition rests on the premise that the collective bargaining agreement between the Company and Local 50 incorporated, at least implicitly, the provision of the union rule that an employee who obtained a union withdrawal card shall be deemed to have terminated his employment (Pet. 2, 9, 10). This premise is contrary to the findings of the Board, which were sustained by the court of appeals. The Board found (Pet. 20a), and the court below agreed (Pet. 4a), that the withdrawal card provision had not become a part of the contract between the Company and Local 50, either by direct incorporation or by custom and practice.[6] Accordingly, the only question presented here is whether a union may enforce a union rule with respect to withdrawal from active membership, which is not incorporated in its

[6] The Board further found (Pet. 18a), and the court sustained the finding (Pet. 4a), that Fisher, in obtaining the withdrawal card, did not state that he was quitting employment at the Company's Bronx plant.

contract with the employer, by affecting an employee's job opportunities.

2. Contrary to petitioner (Pet. 8–11), the conclusion that such action is barred by the Act is fully consistent with *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17. One of the situations there involved union member Fowler who obtained a job with Bull Steamship Company without clearing through the union hiring hall. Bull had a collective agreement with the union which, although it contained a union security provision, did not include a hiring hall provision; the hiring hall requirement was simply a union rule. When notified of Fowler's action, the union refused to clear him and caused Bull to discharge him. The Board and the court of appeals found that the union had violated Section 8(b) (2) an (1)(A) of the Act, for the denial of employment to Fowler restrained and coerced him in his statutory right to refrain from observance of the union's rules and tended to encourage him and his fellow members to comply with union rules in the future. 347 U.S. at 28–33. This Court sustained that finding on the ground that "Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Id.*, at 41. It ruled that employees were entitled to protection in their rights to "be good, bad, or indifferent [union] members * * * without imperiling their livelihood" and that "encouragement to remain in good standing in a union" such as was involved in that case "is proscribed." *Id.*, at 40, 42.

Here, as in *Radio Officers*, the union caused the employer to deprive an employee of his job, not be-

cause of failure to pay periodic dues or initiation fees,[7] but in order to enforce a union rule. Also, as in *Radio Officers,* enforcement of the rule by affecting the employee's job opportunities tended to encourage "union membership." For, as the Board and the court below properly found (Pet. 21a, 7a), the Company's refusal to reinstate Fisher because he had secured a withdrawal card would serve in the future to encourage fellow workers to remain active members of Local 50 during a strike and to discourage transfers to sister locals.[8]

Radio Officers may not be distinguished on the ground that there the employee was being punished for failing to obey a union rule whereas here the employee voluntarily invoked the withdrawal card rule (Pet. 9, 11). The question is whether enforcement of the rule by affecting the employee's employment

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[7] Fisher was required to be current in his dues payments to Local 50 in order to secure a withdrawal card (J.A. 173–174, 85). He secured the withdrawal card on October 29, 1962, and he was passed over for reemployment on November 8 (Pet. 15a–16a). As the court below noted (Pet. 7a), "there is no question but that Fisher's dues were current."

[8] Judge Friendly, in dissent (Pet. 9a–11a), reasoned that, since Local 50 could have demanded Fisher's discharge under the union security clause had he become delinquent in dues, he was already encouraged to remain an active member of that Local; the withdrawal card rule merely afforded Fisher the "lesser" alternative of avoiding the payment of dues without at the same time being treated as delinquent. Whatever validity this view may have in other contexts, it lacks substance here. First, in passing over Fisher for reemployment, Local 50 never purported to rely on the union security clause of its contract. Second, in the circumstances of this case, the withdrawal card rule was not a lesser alternative because Fisher, despite obtaining such a card, continued to pay dues to Local 50 and was current in his dues obligation to that Local (see Pet. 7a, n. 3; n. 4, p. 5, *supra*).

status would tend to encourage union membership, and, as shown, this occurred here no less than in *Radio Officers*. The withdrawal card rule may be of benefit to members who are laid off or who wish to transfer permanently to another location, but during a strike it in no way benefits a member not desiring a permanent transfer. In such circumstances, even though the rule is "voluntarily" invoked, its enforcement by affecting the members' jobs can only inure to the benefit of the union, by encouraging members to remain active and to refrain from seeking a temporary transfer.

3. There is no substance to petitioner's contention (Pet. 12–16) that the Board did not adequately spell out its finding on the tendency of Local 50's action to encourage union membership. As shown, the situation here is virtually the same as that in *Radio Officers*, and the Board explicated the basis for its decision here to the same extent as it did there. The Court recognized in *Radio Officers* that specific proof of an intent to encourage union membership was not necessary where, as here, the union sought to enforce a union policy through discrimination in employment; for encouragement of union membership is "obviously a natural and foreseeable consequence" of discrimination so predicated. 347 U.S. at 52.

Nor is there substance to petitioner's contention (Pet. 8, 16–17) that the Board's decision here interferes with the collective bargaining process and with the union's ability to negotiate contract provisions with respect to the allocation of work. The Board simply found, and the court below agreed, that the

parties had not incorporated the union rule on the effect of securing a withdrawal card in the collective bargaining agreement. Nothing in the decision precludes the parties from negotiating appropriate work allocation provisions in the future,* or purports to restrict the contractual language which may be used for that purpose. See *Cafero* v. *National Labor Relations Board*, 336 F. 2d 115 (C.A. 2), affirming 144 NLRB 1555 (union rule on seniority incorporated into contract).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1965.

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* Indeed, the Board specifically reserved the question of the legality of the withdrawal card provision "if it were a part of the contract" (Pet. 12a, n. 2).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 255

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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STATUTE:

Labor Management Relations Act of 1947 as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 161 et seq.):
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REPLY BRIEF FOR PETITIONER

The Brief in Opposition[1] attributes to the Board findings which it never made, analyzes the controlling precedent in this Court by omitting the critical facts

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[1] The Brief in Opposition will be referred to herein as "Opp." and the Petition for Certiorari as "Pet." References to the decisions of the Board and Court of Appeals will be to the Appendix to the Petition, e.g. "Pet. p. 1a."

on which decision turned and by misstating its holding and ignores completely one of the questions presented by the Petition. Such a virtuoso performance calls for a detailed reply.

I.

A. The first question presented is whether the Board's decision is consistent with *Radio Officers* v. *Labor Board,* 347 U.S. 17. It is the theory of the Petition that the Board's order and its affirmance by the Court of Appeals impermissibly expand *Radio Officers* with respect to two of the elements of an 8(a)(3) violation—1) that the discrimination must have a purpose to "encourage" and 2) that the encouragement be of union "membership". In order to sustain the Board's decision the Memorandum in Opposition finds it necessary to attribute to the Board two findings which it never made.

These "post-hoc rationalizations"[2] are contained in a single sentence:

> "The Board further found that Local 50 had caused the Company to refuse to reinstate Fisher, *not because he had voluntarily quit,* but in order to enforce its rule on withdrawal cards, and that such discrimination would tend to encourage employees to remain active members of Local 50 *during strikes.*" (Opp. p. 5, emphasis supplied).

The underscored findings were never made by the Board, are unsupported by the record, and are indeed squarely contradicted by findings which were actually made. There is nothing in the language of the withdrawal card rule, let alone in the Board's findings, to

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[2] Cf. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168.

suggest that the term "active membership" in the rule relates to being active "during strikes." On the contrary, the Trial Examiner expressly rejected the allegation of the complaint that the union caused the denial of reinstatement because Fisher had not participated in the strike (JA 187, n. 4), a conclusion left undisturbed by the Board. The resurrection of that allegation at this stage of the proceedings can be explained only as an implicit acknowledgment of the validity of the assertion (Pet. pp. 14-16) that the Board's findings do not adequately explain why "active membership" in the union bylaws constitutes "membership" within § 8 (a) (3) as interpreted in *Radio Officers,* 347 U.S. at 40.

In asserting that the Board found that the union had acted "not because [Fisher] had voluntarily quit" the Opposition overlooks entirely the critical finding of the Trial Examiner, adopted by the Board, to which we pointed at p. 10 of the Petition:

> "The union's representatives told Personnel Manager McGuire that Fisher was not to be recalled because he had taken out a withdrawal card from the Union and thus had quit his employment." (JA pp. 184-185)

If the Board had made a finding, as its Supreme Court counsel now claims, that the union's action was not due to the fact that Fisher had voluntarily quit by taking out the withdrawal card, there would be room for arguing that its action can be explained only as punishment of Fisher. Under those circumstances the correctness of the findings as to motivation might have been merely an evidentiary issue virtually immunized from review here by *Labor Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498. But since the Board made no such

finding, and indeed found the contrary, its conclusion that the union had enforced the bylaw is to give the word "enforce" the meaning "relied upon". Whether this is permissible under *Radio Officers* is the central issue presented by the first question in the Petition for Certiorari.[3] That it is not permissible becomes clear when *Radio Officers* is examined with greater care than by the Opposition. For we submit that the Board's statement of *Radio Officers* (Opp. p. 7) omits the main facts on which decision turned.

The controlling facts regarding Fowler, the charging party, were as follows: The union had a rule which required that all members had to be cleared through the union for employment. Fowler bumped another member from a job with the Bull Steamship Company without being cleared by the union. *For this action*

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[3] The Board's version of the Questions Presented, besides ignoring the second question entirely (see pp. 9-10, *infra*) misstates "the circumstances of this case" (Opp. p. 2) in two particulars relevant under *Radio Officers*. The Board assumes that Fisher was "barred from employment", a phrase which carries the innuendo of blacklisting and is therefore suggestive of punishment. The Board, however, found only that the union caused Fisher to be denied seniority status; he was in other words, treated as a new employee. There is not the slightest suggestion that the union would have insisted that Fisher be denied employment if the company were hiring new employees. Nor is there any indication that the union sought to deprive Fisher of his job at Ward's Newark plant, where in fact he was working at the time that the seniority determinations regarding the Bronx employees were being made (Pet. p. 16a).

The Board's further assertion that the union was acting "pursuant to a union rule," while a softer euphemism for "enforcing" which is used elsewhere in the Opposition, is likewise inaccurate. See Pet. pp. 10-11 and pp. 5-6 herein.

Fowler was suspended from membership by the union. The union notified Bull that Fowler was no longer in good standing and that it would never clear Fowler for work with it. 347 U.S. at 30-31. Thus the facts of Fowler's case, omitted from the Board's description, make clear that Fowler was being disciplined by the union and that part of his punishment was denial of future employment by Bull. As this Court said, the union caused the employer to discriminate against Fowler "by denying him employment in order to coerce Fowler into following the union's desired hiring practices..." 347 U.S. at 42.

With Fowler's case in *Radio Officers* contrast Fisher's case here. The union did not suspend Fisher from membership, nor did it take any other punitive action against him. No claim was made that he had violated the union's withdrawal card rule. As we emphasized in the Petition that rule is merely permissive; it expresses no commands. It is therefore meaningless to speak of enforcing the rule against a member, or of punishing him for violating it. When the Board addresses itself to this point it completely misapprehends the meaning of the withdrawal card rule, stating that the rule "in no way benefits a member in desiring a permanent transfer." (Opp., p. 9.) There is nothing in the record to suggest, and there is no finding that Fisher did not desire a permanent transfer at the time he applied for the withdrawal card. On the contrary, it is entirely clear from the record—and indeed from the Board's Opposition itself—that Fisher did benefit from the withdrawal card provision. Fisher requested and obtained the withdrawal card in order to

"avoid paying an initiation fee to the Newark local" (Opp., p. 3).[4]

[4] The Opposition attempts in two ways to suggest that it was wrongful for the union to rely on Fisher's action in securing a withdrawal card to conclude that Fisher had voluntarily quit and thus lost his seniority status at the Bronx plant. Although they are irrelevant to the critical issue of the union's motivation, a closer scrutiny of these efforts may be instructive as measuring the lengths to which the Board is driven in attempting to impute an illegal motive to a totally neutral act.

In order to show that Fisher did not benefit from obtaining the withdrawal card the Memorandum in Opposition draws a distinction between "permanent" and "temporary" transfers. Here again is an argument whose source is the imagination of Supreme Court counsel rather than the reasoning of the Board or the findings and record of this case. The Board's decision draws no distinction between permanent and temporary transfers, an omission which is entirely understandable, since none is drawn in the bylaws dealing with withdrawal cards. If the Board had thought such a distinction material to the legality of the union's motive it would have been forced to dismiss the complaint, since the evidence shows that when Fisher applied for the withdrawal card he said that he was leaving the Bronx plant and was going to work in Newark permanently. (JA 84-87, testimony of Fisher; JA 128-129, testimony of Petitioner's business agent McIntyre.) *Indeed, Fisher made no effort to return to work in the Bronx plant until he was laid off in Newark due to a reduction in force which was subsequent not only to the reopening of the Bronx plant but also to the November conference where the union stated that Fisher had lost his Bronx seniority.* (Pet. p. 16a)

There is an innuendo in the Opposition (p. 3), first advanced by the Court of Appeals (Pet. p. 2a), that Local 84 should not have dunned Fisher for the initiation fee because the plant manager had told him that his work there would be only temporary. Of course, the statement of the Newark plant manager was not communicated to Local 50 and so cannot have any bearing on its motivation. Moreover, the plant manager was wrong, since, as the General Counsel stipulated at the beginning of the hearing, seniority could not be transferred from one Ward plant to another, or retained at one plant while the employee was working at another. (JA 7). If the Newark manager misled Fisher to the latter's detriment, that is not an unfair labor practice on the part of

The Board relies on an additional misconception of the *Radio Officers* holding with respect to motive. It states:

> "Also, as in *Radio Officers,* enforcement of the rule by affecting the employee's job opportunities tended to encourage "union membership." (Opp. p. 8, emphasis supplied)

The assertion that *Radio Officers* supports a finding of illegality where discrimination has a "tendency" to encourage union membership is then twice repeated (Opp. p. 8; id. p. 9). That is not the holding of *Radio Officers.* The rule is that in order to find a violation the union must *intend* to encourage (or discourage) union membership. 347 U.S. at 42-44. Specific proof of intent can sometimes be omitted, but only where the conduct has a *necessary and forseeable* effect of encouragement, not where there is only a "tendency to encourage," id. at 44-46. Yet here the Board found at most (the Brief in Opposition claims no more) such a "tendency." Thus, contrary to the Court of Appeals, specific proof or intent *was* essential to establish a violation. The Board's present reliance (Opp., p. 9), on language in *Radio Officers* that any employer discrimination at the urging of a union is for a motive proscribed by the Act, is misplaced. That statement was superseded in *Teamsters Local* v. *Labor Board,* 365 U.S. 667, 675-676. See also *Labor Board* v. *News Syndicate,* 365 U.S. 695, 699-700.

Local 50. Nor does it controvert the fact that Fisher was benefited by taking the withdrawal card by avoiding the payment of the initiation fee. And while the illegality of any action by Local 84 could in no event be imputed to Local 50, the Board expressly assumed that Local 84 was within its rights in insisting on that payment. (Pet. pp. 18a-19a, n. 3)

B. With respect to the *Radio Officers* issue, the Court below erred not only on the merits, but in the manner of review. We pointed out in the Petition for Certiorari (pp. 13-14) that the Board's decision was unclear as to whether it, like the Court of Appeals, considered this case as coming within the narrow category of conduct for which specific proof of intent was unnecessary. The Brief in Opposition (p. 9) appears to embrace the reasoning of the Court of Appeals, though without elucidating what in the Board's decision justifies such a reading. But it does not thereby meet the issue raised by the Court's willingness to assume the basis of the Board's decision, which is a clear violation of the *Chenery* principle, applied to Labor Board decisions as recently as *Labor Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438. Moreover, even if the Court of Appeals correctly divined the Board's meaning, it should have required the Board to explain why specific proof of motivation was unnecessary. *Textile Workers* v. *Darlington Co.*, 380 U.S. 263, 276-77. Since the situation here is not "virtually the same" (Opp. p. 9) as in *Radio Officers* (see pp. 4-5, *supra*) nothing said by the Board in that case can substitute for the necessary findings in this case. Additionally, the Court of Appeals plainly erred in placing absolute reliance on the Board's "expertise in labor disputes" (Pet. p. 7a) and failing to determine independently whether the union's "conduct carried its own badge of improper motive," as *Labor Board* v. *Brown*, 380 U.S. 278, 292 requires.

The Court further abdicated its review responsibilities by failing to consider, in the face of a dissent addressed to this very point, whether "active membership" within the union bylaw constitutes "member-

ship" within § 8 (a) (3). See Pet. pp. 14-16. Particularly if the phrase "encourage" is given the broad scope which the Court sanctioned, it is essential that "membership" be carefully circumscribed, lest every discharge or seniority determination at the instigation of a union lead to an unfair labor practice charge. The theory of the Opposition that active membership means "active during a strike" would avoid this problem, but as we have seen, only by adding a new and unsupportable finding to the Board's decision, likewise in violation of *Chenery*.

II.

The second question presented by the Petition is whether the legality of the union's conduct under § 8 (a) (3) may turn on whether or not the basis of its action is incorporated in the collective bargaining agreement. That question is totally ignored by the Brief in Opposition, which asserts that there is only one "QUESTION PRESENTED" (Opp. p. 2) and which in its Argument makes no reference to any matter discussed after p. 17 of the Petition. Yet it is clear from the Opposition itself that this issue is critical to the case. In a span of ten pages, the Brief in Opposition five times relies on the fact that the union rule respecting withdrawal cards was not incorporated in the collective bargaining agreement. Opp. pp. 2, 5, 6, 6-7, 9-10.[5] The Board claims that because the parties could immunize their conduct by appropriate provision in the collective bargaining agreement there is no interference with collective bargaining. (Opp. p. 9-10).

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[5] Indeed, the final footnote in the Opposition relies on the same statement in the Board's decision to which the Petition had pointed to show that the decision squarely presents the issue. See Pet. p. 17.

This completely overlooks the point (Pet. pp. 18-19) that the parties' decision whether to spell out in the collective bargaining agreement all possible circumstances under which an employee shall lose his seniority or to leave this determination to the grievance procedure when a particular case arises is itself a judgment which Congress has committed to collective bargaining.

The Petition demonstrated (pp. 18-19) that the statute leaves no room for the contention that the legality of the union's conduct here may depend on the language of the agreement. If any arguments contrary to our position were available, able and resourceful Board counsel would have found and advanced them. Their tactical silence should not enable the Board to avoid this Court's consideration of the issue.

CONCLUSION

With respect to the first Question Presented, the Petition urged that the Board and the Court have erroneously decided an important question regarding the scope and meaning of *Radio Officers* v. *Labor Board,* 347 U.S. 17. The Board's Brief in Opposition seeks to defend its order on the merits, but does not deny that the issue is significant. The legal issue of motivation which is at the heart of this case has its direct antecedent in *Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 45 which first upheld the constitutionality of the predecessor of § 8 (a) (3) on the assumption that the statute authorized the Board to invalidate private determinations with respect to employee hire only on proof of a purpose to interfere with associational rights. A decision which materially alters the line between the licit and the illicit, and which attributes

an illegal motive to wholly neutral conduct, plainly merits review by this Court. Review here is appropriate for the additional reason that in sustaining the Board's order the Court of Appeals violated several principles which this Court has established for review of Labor Board decisions in § 8 (a) (3) cases and of administrative decisions generally. This series of errors urgently calls for the exercise of the Court's supervisory powers as in the cases cited at Pet. p. 12. Finally, the question whether parties must spell out in advance the basis of all hire or seniority determinations or risk unfair labor practice charges is of obvious and uncontroverted importance to all future collective bargaining negotiations.

The Petition for Certiorari should be granted.

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